

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
GIOVANNI VELEZ	:	DETERMINATION
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1982	:	
through November 30, 1984.	:	

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Petitioner, Giovanni Velez, 514 West 207th Street, New York, New York 10034, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through November 30, 1984 (File No. 66209).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 9, 1987 at 2:45 P.M., with additional evidence to be submitted by July 25, 1987. Petitioner appeared by Juan R. Valiente. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUE

Whether penalty asserted against petitioner should be reduced or abated.

FINDINGS OF FACT

1. On July 9, 1985, Giovanni Velez (hereinafter "petitioner") filed a Notification of Sale, Transfer or Assignment in Bulk which advised the State Tax Commission that, on September 26, 1984, he had purchased a grocery store known as Los Panchos Grocery at 514 West 207th Street, New York, New York from Jose A. Munoz. The total selling price was \$75,000.00, with furniture, fixtures, equipment and supplies valued at \$1,500.00. On July 11, 1985, the State Tax Commission issued a Notice to Escrow Agent to Weisberg and Weisberg which contained

the following notice:

"We have been notified that you are the escrow agent in the bulk sale of the seller's business assets which has been made or is about to take place. The State Tax Commission hereby serves notice of a possible claim for any New York State and local sales and use taxes due in accordance with the provisions of Articles 28 and 29 of the Tax Law.

You are hereby notified that, in spite of any provisions contained in the escrow agreement, except as indicated in condition number two listed below, pursuant to Section 1141(c) of the Tax Law, no distribution of funds or property, to the extent of the amount of the State's claim, may be made before the following conditions have been met:

1. The State Tax Commission has determined the seller's liability, if any.
2. Payment of such liability has been made to the State (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law).
3. This office has authorized you to release the funds or property."

2. On October 7, 1985, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner in the amount of \$22,500.00, plus penalty of \$4,975.00 and interest of \$5,493.60, for a total amount due of \$32,968.60 for the period September 1, 1982 through November 30, 1984.

3. At the hearing held herein, petitioner and the Audit Division agreed that the aforesaid assessment should be reduced to \$11,272.82 plus interest and further agreed that the only remaining issue to be considered is whether penalty should be reduced or abated.

4. Petitioner contends that the penalty should be abated by reason of the fact that it was the seller, Jose A. Munoz, who was responsible for the failure to pay sales tax and that it would be unfair to penalize the purchaser for the negligence of the seller.

#### CONCLUSIONS OF LAW

A. That subdivision (c) of section 1141 of the Tax Law provides that whenever a person required to collect tax makes a sale, transfer or assignment in bulk of any part or the whole of his business assets, other than in the ordinary course of business, the purchaser, transferee or

assignee shall, at least ten days before taking possession of the assets or paying therefor, notify the Tax Commission of the proposed sale. For failure to comply with the provisions of such subdivision, the purchaser, transferee or assignee shall be personally liable for payment to the State of any taxes theretofore or thereafter determined to be due to the State from the seller, transferor or assignor, limited to an amount not in excess of the purchase price or fair market value of the assets, whichever is higher.

B. That by failing to notify the Tax Commission of his purchase of Los Panchos Grocery until July 11, 1985 when the actual purchase occurred on September 26, 1984, petitioner did not comply with the provisions of Tax Law § 1141(c).

C. That the Tax Commission may waive the assessment of penalty if the taxpayer establishes that the failure to file a return or to pay or pay over tax within the time required was due to reasonable cause and was not due to willful neglect (Tax Law § 1145[a][1][iii]; 20 NYCRR 536.5[a]). By failing to comply with the provisions of Tax Law § 1141(c), petitioner derivatively became liable for the seller's sales tax liability, including the seller's liability for penalty and interest assessed relative thereto. Although it may well impose a difficult burden upon petitioner to establish that the seller's failure to file, pay or pay over was due to reasonable cause and was not due to willful neglect, this petitioner has failed even to establish that his own noncompliance with the provisions of Tax Law § 1141(c) was due to reasonable cause. No explanation was provided for petitioner's failure to timely notify the State Tax Commission of his purchase of this grocery business. In the absence of a showing of reasonable cause for his noncompliance with the relevant Tax Law provisions, penalty may not be reduced or abated and petitioner's derivative liability must, therefore, include penalty as well as the tax and interest of the seller.

D. That the petition of Giovanni Velez is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 7, 1985 is hereby sustained.

DATED: Albany, New York

October 1, 1987

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ADMINISTRATIVE LAW JUDGE